

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

DESIREE N. KERBY FOR D.N.K.)
A MINOR,)
)
Plaintiff,)
)
v.) CIVIL ACTION NO. 08-G-1540-NW
)
MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
)
Defendant.

MEMORANDUM OPINION

This cause is before the court upon the motion of the Commissioner for to dismiss, or in the alternative, for summary judgment. The court has elected to treat the motion as one for summary judgment.

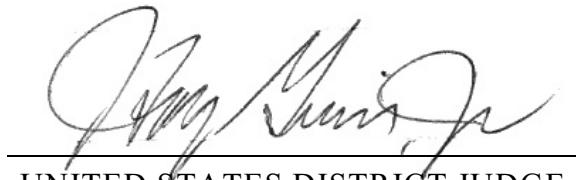
The basis for Commissioner's motion is that this action was not timely filed under 42 U.S.C. § 405(g), which provides that a civil action seeking review of a final decision by the Commissioner must be "commenced within sixty days after the mailing to him of notice of such decision...." The Commissioner has interpreted "mailing" as the date of receipt by the individual of the Appeals Council's notice of denial of request for review of the presiding officer's decision. 20 C.F.R. § 422.210(c). The date of receipt is presumed to be five days after the date of such notice, unless there is a reasonable

showing to the contrary made to the Appeals Council. 20 C.F.R. §§ 404.901, 416.1401, 422.210(c).

The uncontradicted declaration of Patrick J. Herbst establishes that the Appeals Council denied review of plaintiff's claim on June 19, 2008. The fifth day following the Appeals Council's denial was June 26, 2008. The plaintiff submitted a copy of the Notice of Appeals Council Action showing it was received by plaintiff's attorney on June 23, 2008. Based upon the presumptive date of receipt (which was if fact later than the date plaintiff's attorney actually received the notice), the time limit for filing plaintiff's complaint was August 25, 2008. Plaintiff's complaint was filed on August 27, 2008. The plaintiff has asserted no circumstances in the present case that would justify a tolting of the sixty-day requirement of 42 U.S.C. § 405(g). Accordingly, there exist no genuine issue as to any material fact, and plaintiff's appeal is due to be dismissed with prejudice.

An appropriate order will be entered contemporaneously herewith.

DONE and ORDERED 5 January 2009.



UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.